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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

To the Commission:

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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August 21, 2001

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SUMMARY

CompTel agrees with the Commission that “a minute is a minute,” and that minutes should not be regulated differently merely due to the label with which they have been designated. However, the most effective way to encourage the “efficient use of, and investment in, telecommunications network” is to foster vigorous competition among all carriers. It is crucial to the development of competition that there be cost-based interconnection rates where one carrier (or class of carriers) has market power and traffic balances between the carriers are not roughly equal. The prospect of having to pay symmetrical intercarrier compensation rates to competitive carriers restrains ILECs from fully exercising their market power to the detriment of competition. Without symmetrical responsibilities to reimburse carriers for the costs they incur to terminate traffic, the downward trend in reciprocal compensation rates since the Commission implemented the 1996 Act might never have occurred. Where the traffic flow between competing carriers is not roughly equal, cost-based intercarrier compensation promotes efficient competitive entry and competition, which in turn expands consumer choice, spurs innovation, and moves end user prices toward cost.

Despite the downward trend in reciprocal compensation rates, the Commission recently adopted bill-and-keep as an interim measure in the ***ISP Intercarrier Compensation Order,*** and it now proposes a mandatory bill-and-keep regime for all traffic subject to the Act’s reciprocal compensation requirements, even where the traffic flow between competing carriers is not roughly equal. However, where the traffic flow between competing carriers is not roughly equal, mandatory bill-and-keep effectively sets an intercarrier compensation rate of zero for the surplus traffic. An intercarrier compensation rate of zero is not cost-based, and thus it violates the Telecommunications Act of 1996, the **U.S.** Constitution, and the Reference Paper of

Reference Paper on Pro-Competitive Regulatory Principles negotiated as part of the WTO Basic Telecom Agreement.

The imposition of mandatory bill-and-keep where the traffic flow between competing carriers is not roughly equal would also require the Commission to create problematic new regulatory distinctions (*e.g.*, the definition of central office or local access) that determine which interconnecting carrier would bear the costs of transport and access, and thus which carrier would have to recover these costs from its end users. This would require, among other things, stringent new regulation of transport services, and would spawn a whole new series of disputes between carriers with market power and their competitors. Implementation of these new regulatory distinctions, which have no real meaning in the context of the network, would be administratively burdensome, complex and expensive. Thus, imposition of mandatory bill-and-keep would not represent step towards deregulation, but rather the exchange of one regulatory scheme for another that would favor carriers with market power and blunt the incentives that vigorous competition creates.

The imposition of mandatory bill-and-keep where the traffic flow between competing carriers is not roughly equal would also create incentives for a carrier to reconfigure its network in order to maximize the costs that its competitors incur to terminate calls that its consumers originate and minimize the costs that it incurs to terminate calls from the customers of its competitors. This behavior would lead to inefficient network configurations, and would spawn an entirely new series of disputes over what costs the respective carriers must bear, particularly as networks and technologies evolve. Thus, unlike cost-based intercarrier-compensation rates, the imposition of mandatory bill-and-keep would harm competition and result in an inefficient intercarrier compensation regime.

Imposition of a mandatory bill-and-keep regime where the traffic flow between competing carriers is not roughly balanced would also be anti-consumer. For example, if subscribers were charged on a per call or minute of use basis, they would be able to avoid additional charges only by refusing to answer their phones and refusing to use answering machines. The result would be even worse where subscribers are charged on a flat rate basis because they would have no means whatsoever to avoid the additional costs they would incur for receiving calls. It is hard to imagine that the public interest would be served by forcing families to pay higher costs for calls from telemarketers or political pollsters that interrupt their dinner based on the false assumption that these calls benefit the families as much as the telemarketers and political pollsters, particularly when the families may not have the means to avoid these additional costs.

In a very real way, the mandatory bill-and-keep proposals upon which the Commission has requested comment would wrest control over telecommunications costs away from subscribers, because they would no longer be able to reduce costs by choosing to place fewer calls. Therefore, CompTel urges the Commission to reject proposals for intercarrier compensation regimes that impose mandatory bill-and-keep where the traffic flow between competing carriers is not roughly balanced.

TABLE OF CONTENTS

Before the
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In the Matter of	)	
	)	
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To the Commission:

COMMENTS

The Competitive Telecommunications Association ("CompTel"), through its attorneys, submits these comments in response to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.[1] CompTel is the premier industry association representing competitive telecommunications providers and their suppliers in the United States. CompTel's member companies include the nation's leading providers of competitive local exchange services and span the full range of entry strategies and options. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future.

I. INTRODUCTION AND BACKGROUND

The most effective way to encourage the "efficient use of, and investment in, telecommunications network"[2] is to foster vigorous competition between all carriers, and ensure

1 Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, ***Notice of Proposed** Rulemaking*, FCC 01-132 (rel. Apr. 27,2001) ("NPRM").

2 NPRM at ¶ 2.

that carriers with market power are not allowed to abuse that power to the detriment of their competitors. It is crucial to the development of competition that there be cost-based interconnection rates where one carrier (or class of carriers) has market power and traffic balances between the carriers are not roughly equal. The prospect of having to pay symmetrical intercarrier compensation rates to competitive carriers restrains ILECs from fully exercising their market power to the detriment of competition. Without symmetrical responsibilities to reimburse carriers for the costs they incur to terminate traffic, the downward trend in reciprocal compensation rates since the Commission implemented the 1996 Act might never have occurred.

Despite the downward trend in reciprocal compensation rates, the Commission recently adopted bill-and-keep as an interim measure in the *ISP Intercarrier Compensation Order*,[3] and it now proposes a mandatory bill-and-keep regime for all traffic subject to the Act's reciprocal compensation requirements, even where the traffic flow between competing carriers is not roughly equal. The FCC bases its proposed change of approach on a conceit that is little more than a casuistry, which is that if called parties benefit from some calls then the calling party's network pays ("CPNP") system is somehow no longer efficient or fair and must be changed. CompTel strongly opposes the *ISP Intercarrier Compensation Order* and urges the Commission not to assume that it will be upheld on appeal in the United States Court of Appeals for the District of Columbia Circuit. For similar reasons, CompTel urges the Commission not to

[3] *See, e.g.,* NPRM at ¶ 3, *citing* Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on Remand and Report and Order,* FCC 01-131 (rel. April 27, 2001) (*"ISP Intercurrier Compensation Order").*

impose mandatory bill-and-keep where the traffic flow between competing carriers is not roughly equal.[4]

Where traffic flow between competing carriers is not roughly equal, mandatory bill-and-keep effectively sets an intercarrier compensation rate of zero for the surplus traffic. An intercarrier compensation rate of zero is not cost-based, and thus it violates the Telecommunications Act of 1996, the U.S. Constitution, and the Reference Paper of Reference Paper on Pro-Competitive Regulatory Principles negotiated as part of the WTO Basic Telecom Agreement.

The imposition of mandatory bill-and-keep where the traffic flow between competing carriers is not roughly equal would also require the Commission to create problematic new regulatory distinctions (*e.g.*, the definition of central office or local access) that determine which interconnecting carrier would bear the costs of transport and access, and thus which carrier would have to recover these costs from its end users. Thus, imposition of mandatory bill-and-keep would not represent step towards deregulation, but rather the exchange of one regulatory scheme for another that would favor carriers with market power and blunt the incentives that vigorous competition creates.

4 CompTel only opposes the imposition of mandatory bill-and-keep regimes where traffic flows between competing carriers are not roughly equal. However, CompTel supports intercarrier compensation regimes that allow carriers voluntarily to agree to bill-and-keep or mandatory bill-and-keep where "traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates." Accordingly, CompTel defines the term "mandatory bill-and-keep" for the purposes of these comments to mean "mandatory bill-and-keep regimes where traffic flows between competing carriers are NOT equal, including the adoption of a default bill-and-keep regime in these circumstances." These comments also assume that there are positive incremental costs associated with the termination of traffic. If there were no positive incremental costs to terminate traffic, then bill-and-keep would be permissible under the Act and current Commission policies without any fundamental changes in the basic assumptions of cost causation.

The imposition of mandatory bill-and-keep where the traffic flow between competing carriers is not roughly equal would also create incentives for a carrier to reconfigure its network in order to maximize the costs that its competitors incur to terminate calls that its consumers originate and minimize the costs that it incurs to terminate calls that the customers of its competitors. This behavior would lead to inefficient network configurations, and would spawn an entirely new series of disputes over what costs the respective carriers must bear, particularly as networks and technologies evolve. Thus, unlike cost-based intercarrier-compensation rates, the imposition of mandatory bill-and-keep would harm competition and result in an inefficient intercarrier compensation regime.

Imposition of a mandatory bill-and-keep regime where the traffic flow between competing carriers is not roughly balanced would also be anti-consumer. For example, if subscribers were charged on a per call or minute of use basis, they would be able to avoid additional charges only by refusing to answer their phones and refusing to use answering machines. The result would be even worse where subscribers are charged on a flat rate basis because they would have no means whatsoever to avoid the additional costs they would incur for receiving calls. It is hard to imagine that the public interest would be served by forcing families to pay higher costs for calls from telemarketers or political pollsters that interrupt their dinner based on the false assumption that these calls benefit the families as much as the telemarketers and political pollsters, particularly when the families may not have the means to avoid these additional costs.

II. MANDATING BILL-AND-KEEP WILL NOT RESOLVE THE ISSUES THAT THE COMMISSION SEEKS TO ADDRESS

In the NPRM, the Commission claims that the existing intercarrier compensation rules raise several pressing issues, including: (1) opportunities for regulatory arbitrage created by the existing patchwork of intercarrier compensation rules, which the Commission apparently considers to be the most important issue;’ (2) the appropriate interconnection rates for different types of networks (*e.g.*, whether different types of networks require different interconnection rates);[6] and **(3)** distortions in the structure and level of end-user charges, which in turn distort subscription decisions by end users, that inefficient intercarrier compensation rules likely cause.’ In order to address these issues, the Commission issued the NPRM to “test the concept of a unified regime for the flows of payments among telecommunications carriers that result from the interconnection of telecommunications networks under current systems of regulation.”’ Specifically, the Commission seeks comment on the feasibility of a bill-and-keep approach for a unified regime.’

As a general matter, CompTel agrees with the Commission that “a minute is a minute,” and that minutes should not be regulated differently merely due to the label with which they have been designated.” Adoption of a federal intercarrier compensation rule based on the “minute is a minute” principle will ensure that call termination is priced efficiently. It is ironic,

5 NPRM at ¶ 11.

6 ***Id.*** at **¶ 16.**

7 *Id.* at ¶ 17.

8 *Id.* at ¶ 1.

9 *Id.*

10 *Id.*

however, that the Commission has asked for comment on a “unified” regime but has carved out huge segments of traffic for different treatment. For example, the contrast between the Commission’s treatment of reciprocal compensation for ISP-bound traffic – low mandated rates moving quickly to bill-and-keep – with ILEC access charges – higher rates with five-year life span under CALLS – could not be greater. Moreover, a unified regime for intercarrier compensation will not, in and of itself, address the issues that the Commission has identified, including “regulatory arbitrage.”

CompTel also agrees with the Commission that, in some circumstances, bill-and-keep can be an efficient means of intercarrier compensation. In this regard, CompTel supports interconnection regimes that allow carriers voluntarily to agree to bill-and-keep or states to impose bill-and-keep where “traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates.”” As is the case with local reciprocal compensation (and for the same reasons), bill and keep is not an option – and has never been an option – when exchanged traffic is significantly out of balance. However, imposing a mandatory bill-and-keep regime or a default bill-and-keep rule (which will have the same result as a mandatory bill-and-keep rule) will not address the issues that the Commission seeks to address.

A. Mandatory Bill-and-Keep Would Not Address Perceived “Regulatory Arbitrage” Issues

In the NPRM, the Commission claims that its existing interconnection regulations create opportunities for “regulatory arbitrage,” which it defines as “profit-seeking behavior that can arise when a regulated firm is required to set different prices for products or services with

[11] *See, e.g., id.* at ¶ 20.

similar cost structure."[12] The Commission seeks comment on whether the imposition of mandatory bill-and-keep will eliminate or ameliorate most of the "regulatory arbitrage" opportunities caused by existing interconnection regulations.[13]

As an initial matter, CompTel notes that "profit-seeking behavior" is the essence of competition, and that the Commission historically has relied on, and encouraged, competition of the type that it defines here as "regulatory arbitrage" to apply pressure on carriers with market power to reduce their rates to more cost-based levels. As explained by the Commission, "[a]rbitrage, in the Commission's regulatory scheme, is seen not as a means of developing vested interests, but as a way of bringing rates into line with competitive pricing patterns."[14] For example, the Commission has relied upon the ability of non-facilities-based cellular resellers to engage in arbitrage to discipline price discrimination by facilities-based providers of cellular services.[15] Similarly, the Commission relied upon arbitrage from resale to reduce substantially the possibility of unreasonable price discrimination of WATS.[16] The Commission also promotes the resale of international private lines ("IPLs") to provide switched services in order to "foster new entry into the international telecommunications market and exert downward pressure on above-cost international accounting rates through the diversion of switched traffic to resold

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12 *Id.* at footnote 18.

13 ***Id.*** at ¶ 52.

14 AT&T, 94 FCC 2d 48, ¶ 33 (1983).

15 **See,** *e.g., Cellnet Communication,Inc. v. FCC*, 70 RR 2d 1321 (June 9, 1992) (discussing beneficial effects of arbitrage).

16 *See, e.g.,* AT&T, 4 FCC Rcd 5389, ¶ 22 (1989)("We believe that the arbitrage from WATS resale has substantially reduced the possibility of price discrimination.").

private lines."[17] Promoting this type of "regulatory arbitrage" serves the public interest in increased competition and reduced prices for telecommunications, and puts downward pressure on above-cost rates by creating low-cost alternatives to existing high-rate services.'' Consequently, the Commission should move carefully in the current proceeding to ensure that efforts to eliminate or ameliorate "regulatory arbitrage" do not unintentionally blunt competitive forces that prevent carriers with market power from exercising that power anti-competitively.

In any event, the only means for eliminating or ameliorating all opportunities for "regulatory arbitrage," as defined by the Commission, is to eliminate, or at least not defend, artificial rate distinctions between multiple classes of regulated service. A minute is a minute – the jurisdictional nature of traffic does not affect the way in which costs are incurred. However, the Commission has taken a number of steps over the past few years that are antithetical to this concept, and that – unless reversed – will prevent the Commission from eliminating or ameliorating "regulatory arbitrage." The Commission's decisions to impose interim restrictions on the use of enhanced extended links ("EELs"), to create a new regulatory category for ISP-bound traffic and to adopt the CALLS proposal for high ILEC access rates are prime examples. These rules, and the distinctions upon which they are based, serve only to support non-cost based regulated prices, exacerbate uneconomic "profit-seeking" behavior, and harm competition. The elimination of these rules would be far more practical and beneficial to competition than

17 *See, e.g.,* Hong Kong Telecommunications (Pacific) Limited, 13 FCC Rcd 20050, ¶ 19 (1998) (explaining the International Resale Order, 7 FCC Rcd 559).

18 See, *e.g., id.* at ¶ 47; 1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements, 14 FCC Rcd 7963 (1999).

exploration of new theories about the relationship between potential call benefits and cost causation.

In reality, imposition of mandatory bill-and-keep would result in the same type of "profit seeking behavior" based on regulatory distinctions that the Commission disparages in the NPRM. Mandatory bill-and-keep would create incentives for a carrier to reconfigure its network in order to maximize the costs that other carriers incur to terminate calls that its customers originate, while minimizing the costs that it incurs to terminate calls that the customers of other carriers originate. This behavior would lead to inefficient network configurations, and would spawn an entirely new series of disputes over what costs the respective carriers must bear, particularly as networks and technologies evolve. Rather than simply placing the burden of inefficient rate design on parties outside of the regulatory process (the end users), the Commission should simply eliminate artificial regulatory rate distinctions.

B. Mandatory Bill-and-Keep Would Not Encourage Efficient Use of, and Investment in, Telecommunications Networks or the Efficient Development of Competition

Imposing any mandatory bill-and-keep regime that requires carriers to receive compensation for termination costs solely from their end users will not resolve the issues that the Commission seeks to address in the NPRM. Significantly, nowhere in either the Commission's revised assumptions about cost causation, or in any of its new proposals, does the Commission or anyone else identify a systemic failure in the CPNP system codified in the Act. Ironically, mandatory bill-and-keep regimes are no less immune to inefficiency and will allow ILECs to engage in anti-competitive behavior designed solely to impose costs on CLECs, and end users, rather than increase efficiency of the network. The bill-and-keep regimes that the Commission discusses in the NPRM suffer from fatal flaws at two levels. First, these proposals focus too heavily on the dynamics of individual calls and thus "miss the forest for the trees." Second, the proposals make assumptions about the dynamics of individual calls that are inaccurate. The end result is that if the Commission imposes mandatory bill-and-keep, then inefficient interconnection practices will worsen and competition will be further harmed.

1. Mandatory Bill-and-Keep Would Not Send Efficient Signals Because the Party Who Makes the Call is the Cost Causer.

The Commission notes in the NPRM that bill-and-keep arrangements are generally considered inefficient under traditional analyses of intercarrier compensation. **As** the Commission explains:

> [I]f one assumes that the calling party should pay the cost of the terminating carrier, then a bill-and-keep arrangement is only efficient if the cost of transporting and terminating a call is zero. If there is a positive cost of termination, . . . then a bill and keep arrangement is inefficient because it will cause originating carriers (and calling parties) to overuse other carriers' termination facilities.[19]

The Commission appears to agree with this analysis if it is assumed that the calling party should pay the cost of the terminating carrier. However, the Commission questions the assumption that the calling party should pay the cost of the terminating carrier.[20]

The Commission questions the proposition that the calling party should pay the cost of the terminating carrier based on the following two assumptions: 1) the party or parties who benefit from a call are responsible for causing the cost of the call; and 2) both parties to any given call benefit from that call. Both of the Commission's proposed assumptions are

19 NPRM at ¶ 20.

20 *Id.* at ¶ **37.**

empirically incorrect. However, even if they were correct, these changed assumptions cannot make efficient what is fundamentally inefficient. In reality, only the calling party can be said to "cause" the cost of any given call and thus should pay the cost for termination of that call, and the benefits fiom any given call are almost never equal to both parties, if both parties even benefit at all.

a. <u>Call benefit is not a valid proxy for cost causation</u>

In the NPRM, the Commission contends that the party or parties who benefit from a given call are responsible for causing the cost of that call. CompTel generally agrees with the Commission that the party responsible for causing the cost of any given call should be responsible for paying the cost to terminate that call. However, call benefit is not a valid proxy for cost causation. Therefore, the Commission should not try to analyze who benefits fiom a given call in order to determine who should pay the cost to terminate that call.

With respect to any given call, three decisions have been made. First, the calling party has decided to acquire the facilities and/or subscribe to the telecommunications service necessary to originate a call (which generally are the same facilities and/or service necessary to receive a call). Second, the called party has decided to acquire the facilities and/or subscribe to the telecommunications service necessary to receive a call (which generally are the same facilities and/or service necessary to originate a call). Third, the calling party has made a conscious and voluntary decision to place a call to the called party.

For public policy reasons, the Commission has never deemed a party to have caused the cost of any given call based solely upon that party's decision to acquire the facilities or subscribe to the telecommunications services necessary to place or receive a call. For example, long-standing Commission policy has been to increase penetration rates in the United States, which is defined as "the percentage of households within a specified area that have telephone service in the housing unit."[21] This is consistent with the Commission's "statutory goal of preserving and advancing universal service and of ensuring that consumers in all regions of the Nation have access to the services supported by federal universal service support mechanisms.. . ."[22]

Attributing cost causation based solely on an end user's decision to acquire telephone service – and allocating the costs of any given call on this basis – would deter subscription to, and use of, the public switched telecommunications network, which is fundamentally inconsistent with the Commission's statutory goals. Fewer end users would subscribe to telecommunications services because they would be forced to pay the costs of terminating calls that they did not choose to receive. In a very real way, the proposals upon which the Commission has requested comment would wrest control over telecommunications costs away from subscribers, because they would no longer be able to reduce costs by choosing to place fewer calls.

If end users were charged on a per call or minute of use basis for calls they receive, they would be able to avoid additional charges only by refusing to answer their phones and by refusing to use answering machines.[23] This result is anti-consumer and nearly as bad as

21 Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, 15 FCC Rcd 12208, ¶ 25 (2000).

22 *Id.* at ¶ 25. ***See*** *also* 47 U.S.C. § 254(b) (enumerating universal service principles).

23 Alternatively, they would be forced to ask their telecommunications service provider to block any type of call that would increase their rates (*e.g.*, any calls originating on another carrier's network).

not subscribing to telecommunications services at all. The result would be even worse where subscribers are charged on a monthly averaged, flat rate basis because they would have no means whatsoever to avoid the additional costs they would incur for receiving calls – particularly calls they do not want (e.g., telemarketing calls during dinner) – under the proposals discussed in the NPRM. Accordingly, the Commission does not have the statutory authority to impose a mandatory bill-and-keep regime that allocates costs like the ones discussed in the NPRM.[24]

The only basis upon which the Commission can allocate costs consistent with the Communications Act of 1934 is the conscious and voluntary decision by the calling party to place a call to the called party. As such, the traditional view of cost causation is also the only view that is consistent with the Act, as well as the only view that is economically efficient because the party who initiates the call is the party who should pay the costs for that call. This allows subscribers throughout the United States and in all economic classes to subscribe to telecommunications services without fear that decisions by third parties – many of whom the subscriber does not know – will be able to increase their costs for those services without their permission, and encourages use of the network.

CPNP regimes are economically efficient because the party who consciously and voluntarily decides to place a call is in the best position to choose the carrier(s) that can minimize the costs of originating, transporting and terminating that call. The calling party is also in the best position to decide whether to initiate a call in the first place, which is another

[24] ***See, e.g.***, 47 U.S.C. § 151 (explaining that purpose of the Act is to ***"make available,*** so far as possible, to all people of the United States, without discrimination on the basis or race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . ." (emphasis added)) See also the explanation of why mandatory bill-and-keep is illegal under the Act in Section III of these comments.

important vehicle for sending pricing signals to carriers. It is the sole control that a calling party has over the decision to initiate a call that makes CPNP regimes economically efficient and appropriate from a public policy standpoint, not any assumptions about the "beneficiary" of the call itself.

Determining who is the sole, primary or joint beneficiary of any particular call would be extraordinarily difficult, if not impossible. Even where both parties to a call "benefit" from that call, the Commission's assumption that the benefits are split on a 50/50 basis will almost never be accurate. In any event, the benefits that may or may not accrue as the result of the calling party's decision to place a call exhibit no identifiable correlation to any of the conscious and voluntary decisions that lead to the origination, transport and termination of a particular call. Efficient economic signals will have a beneficial effect only if they are received by the party who makes a conscious and voluntary decision to take a specific act that creates costs which must be recovered. Therefore, "call benefit" is not an acceptable proxy for "cost causation," and call benefit should have absolutely no implication for the choice of an intercarrier payment regime.[25]

b. <u>The Commission should not assume that both parties benefit from any given call</u>

In the NPRM, the Commission seeks comment on whether both the calling and the called party benefit from a call.[26] CompTel notes that the answer to this question – if it could be determined at all – would depend upon how the Commission defined "benefit." However, it

25 NPRM at ¶ **37.** Moreover, the CPNP regime already accommodates situations in which the called party receives most of the benefits (e.g., collect calls, toll free calls, etc. . . .).

26 *Id.* at ¶ 28.

would be impossible for the Commission to define the term "benefit" in a principled way that would correspond with cost causation.

Trying to determine whether any of the parties to a given call accrues a "benefit" from that call would be extremely complex. In some circumstances, none of the parties to a call accrue any benefits (*e.g.*, a misdial). In other circumstances, only the calling party accrues any benefits (*e.g.*, a telemarketer disturbing a family during dinner time). Finally, both parties to a particular call may accrue benefits (*e.g.*, a mother calling her son, a customer calling a pizza delivery service to place an order), although the benefits will almost never be split on a 50/50 percent basis. Although there may also be circumstances in which only the called party may accrue benefits from a given call, it is hard to imagine that this would occur frequently since the calling party would have no incentive to initiate such a call.

Even if the Commission could define the concept of "call benefit," it would only be able to classify who benefited from a particular call after the call is completed; At the moment that the calling party initiates a call, as well as at the moment when the called party accepts a call, neither party is capable of determining who will benefit from that call, or how much each party will benefit. As such, trying to allocate costs to the party or parties who benefit from a call in order to send efficient economic signals is a futile exercise; parties cannot adjust their behavior based on call benefits because they cannot know who will benefit from the call before initiating or accepting any given call. By contrast, when costs are allocated to the calling party, that party can make efficient choices about whether to initiate a given call, and, if a call is initiated, which carrier(s) and/or services to utilize for the call (*e.g.*, LEC, and in some cases, pre-subscribed IXC, dial-around IXC or toll free service provider).[27]

Given the difficulties in determining who if anyone benefits from any given call, the Commission would be forced to make some arbitrary assumption about call benefits if it attempts to utilize "call benefit" as a proxy for "cost causation." In the NPRM, the Commission arbitrarily assumes that both the calling and called parties benefit equally from any given call, and thus propose that the parties split the costs for the call evenly.[28] However, it is hard to imagine that the public interest would be served by forcing families to pay higher costs for calls from telemarketers or political pollsters that interrupt their dinner based on the false assumption that these calls benefit the families as much as the telemarketers and political pollsters, particularly when the families may not have the means to avoid these additional costs.

2. Bill-and-Keep is Particularly Inappropriate When One Carrier or Class of Carriers Still Has Market Power or Traffic Flows are not Roughly Balanced

CompTel supports interconnection regimes that allow carriers voluntarily to agree to bill-and-keep or states to impose bill-and-keep where "traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates."[29] However, mandatory bill-and-keep regimes like the one discussed in the NPRM are completely inappropriate for the reasons the Commission acknowledges, particularly so where when one

21 The carrier that the calling party selects will then represent the interests of the caller by pressuring the terminating LEC to reduce access charges.

28 *See, e.g., id.* at ¶ 37 ("If a caller telephones a catalog merchant, surely that merchant benefits at least as much as the caller.").

29 *See, e.g., id.* at ¶ 20.

carrier or class of carriers still has market power or traffic is not roughly balanced in the two directions. In fact, where one carrier has market power or traffic is not roughly balanced, a default bill-and-keep regime will have the same effect as a mandatory bill-and-keep regime, because the carrier that has market power or originates more traffic will have an incentive not to reach an agreement with the other carrier to ensure that bill-and-keep will apply.

In addition to the problems the Commission has recognized with applying bill-and-keep where there are positive incremental costs to terminate traffic, mandatory bill-and-keep is problematic where one carrier or class of carriers has market power, because there is a great disparity between the ability of the dominant and non-dominant carriers to recover termination costs from their own end users. The non-dominant competitive carrier has a much smaller customer base over which to spread these termination costs, which will impose much greater pressure upon the non-dominant carrier to raise end user rates. Under these conditions, competition is unlikely to develop. Thus, the non-dominant carrier will be unable to provide any discipline to a unilateral, supra-competitive price increase by the dominant carrier.

The disparity in market power will also allow the dominant carrier under a bill-and-keep regime to engage in activities designed solely to impose costs on CLECs, encouraging parties to place massive amounts of calls to CLECs, which must terminate them all for free pursuant to bill-and-keep. For example, an ILEC might offer discounted retail rates to a telemarketer that originates many calls that target CLEC customers. In so doing, the ILEC would receive an immediate windfall that is entirely unrelated to efficiency; when the ILEC's customer calls a CLEC's customer (*e.g.*, an ISP), the ILEC avoids the cost of call termination, which is imposed upon the CLEC, but retains the revenue in end-user rates. Although the ILEC would have to pay for transport costs to get the calls to the CLEC, the ILEC may be willing to incur these costs because it will retain the revenues from its own end user while it increases the CLECs' termination costs; thus allowing the ILEC also to raise termination rates to the same class of customer upon its own network.

Mandatory bill-and-keep regimes also ignore the fact that competitive pressures will most likely prevent CLECs from raising end user rates to recover termination costs from their end users unless their primary competitor, the ILEC also raises rates. However, if the ILEC cannot raise its end user rates due to rate regulation, then CLECs will not be able to raise their end user rates either. However, the end result will have a much greater impact on the CLEC. Mandatory bill-and-keep is particularly problematic where rate averaging is required (*e.g.*, rate averaging pursuant to Section 254), because rate averaging makes it even more difficult for CLECs to recover termination costs from their own customers. Mandatory bill-and-keep would allow an ILEC to engage in anticompetitive price discrimination against IXCs and their customers by offering customers who use the ILEC's inter- and intra-LATA toll services a discount on local services.

3. TELRIC-Based Rates under a CPNP Regime Promote Efficient Competitive Entry and Competition

It is crucial to the development of competition that there be cost-based interconnection rates where one carrier (or class of carriers) has market power and traffic balances between the carriers are not roughly equal. The prospect of having to pay symmetrical intercarrier compensation rates to competitive carriers restrains ILECs from fully exercising their market power to the detriment of competition. Without symmetrical responsibilities to reimburse carriers for the costs they incur to terminate traffic, the current downward trend in reciprocal compensation rates might never have occurred.

Shortly after passage of the 1996 Act, the ILECs sought high reciprocal compensation rates that far exceeded costs in order to maximize the payments they receive from CLECs, and to support their arguments that their access charges were "cost-based." These initial reciprocal compensation rates were as high as $.01 per minute. Some CLECs responded by seeking customers, like ISPs, that receive more traffic than they originate,[30] which created incentives for the ILECs to lower their reciprocal compensation rates, which in turn creates more pressure for the ILECs to lower their access rates to competitively-priced levels.

Imposing a mandatory bill-and-keep regime would unintentionally blunt the competitive forces that have prevented carriers with market power from exercising that power anti-competitively. Unless ILECs are forced to compensate CLECs for the costs they incur to terminate ILEC-originated traffic, the existing competition-driven incentive to lower local reciprocal compensation rates will disappear and ILECs will endeavor to keep them uneconomically high. **As** such, the Commission's traditional approach to bill-and-keep is correct; bill-and-keep may be appropriate, provided that the traffic exchanged between the interconnecting carriers is relatively balanced and neither party has rebutted the presumption of symmetric rates.[31]

Where traffic exchanged between the interconnected carriers is not balanced, the economically sound cost causation and recovery principles that form the foundation of the pricing rules adopted by the Commission in its implementation of the local competition

30 It is important to note that not every CLEC pursues customers that receive more traffic than they originate, and that not every CLEC benefits from high reciprocal compensation rates. CLECs who are net originators of calls (*e.g.*, VOIP, telemarketing traffic, etc . . .) may prefer low reciprocal compensation rates in order to minimize costs.

31 *Id.* at ¶ 8, *citing Local Competition* ***Order,*** 11 FCC Rcd at 16054-58¶¶ 1111-18; 47 U.S.C. § 252(d)(2)(B).

provisions of the 1996 Act suggest that applying the TELRIC-based call termination rate to all types of traffic, including ISP-bound traffic, is the "correct" result from an economic policy and consumer perspective.[32] The Commission already has determined that TELRIC pricing will promote efficient competitive entry and competition, which will in turn expand consumer choice, spur innovation, and move end user prices toward cost.[33] CompTel submits that TELRIC-based intercarrier call compensation is likely to promote competition for all types of traffic, including ISP-bound and exchange access traffic, and, in turn, have a downward impact on the retail rates and expand service options offered to end users.

Application of TELRIC-based pricing will promote efficient pricing for all interconnection and unbundling purposes, which will foster the development of local competition. The ILECs have immense incentives to set UNE rates artificially high and reciprocal compensation rates artificially low. Under a federal "minute is a minute" rule, however, an ILEC would have fewer incentives to manipulate a cost study in order to achieve higher UNE or terminating access rates because the same cost study would also lead to higher reciprocal compensation/information access rates. This result is also efficient because the way in which an ILEC incurs costs generally does not differ depending upon the regulatory

32 Eventually, this same rate also should apply to terminating exchange access for interstate calls. **A** minute is a minute – the jurisdictional nature of traffic does not affect the way in which costs are incurred.

33 *E.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 679,705 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) ("*CompTel*"), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*Iowa Utils. Bd.*"), *aff'd in part and reversed in part sub nom. AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

classification with which it is labeled, as the Commission has recognized. Thus, an ILEC's costing methodology should be applied consistently to all terminating and originating functions.

ILEC cost studies should also remain the presumptive proxy for other carriers' costs.[34] As the Commission recognized in the *Local* Competition Order, application of TELRIC should produce results that are substantially the same for each carrier because an ILEC and an interconnecting CLEC are likely to serve the same geographic area, and the TELRIC methodology is forward-looking.[35] The resulting rate symmetry will reduce the ability of ILECs to use their market power to force excessively high termination rates – or, for traffic expected to be principally outbound from the ILEC, excessively low rates.[36] This approach is also administratively easier because competing carriers need not conduct separate cost studies.[37]

34 *Local* Competition Order, ¶¶ 1085-89.

35 *Id.* at ¶ 1085.

36 *Id.* at ¶ 1087. Because CLECs can deliver millions of minutes of terminating traffic, rate symmetry will create incentives for ILECs to replacing uneconomic and excessive reciprocal compensation rates with termination rates *for all* ***types*** *of traffic* that more closely approximate costs and are consistent with the FCC's proxies. ***Id.*** ¶ 1087.

37 *Id.* at ¶ 1088. Of course, as with local call termination, a competing carrier that believes its costs are higher than those of the ILEC should continue to have the opportunity to present a study to demonstrate such costs. *Id.* ¶ 1089.

III. MANDATORY BILL AND KEEP IS ILLEGAL UNDER THE ACT, THE FIFTH AMENDMENT OF THE CONSTITUTION. AND THE REFERENCE PAPER ON PRO-COMPETITIVE REGULATORY PRINCIPLES (WTO BASIC TELECOM AGREEMENT)

The imposition of mandatory bill-and-keep where the traffic flows between competing LECs are not balanced is illegal.[38] As Congress made clear in Section 252(d)(2)(B)(i) of the Act, "bill and keep" may be imposed as an alternative to actual cash-based reciprocal compensation only when mutual cost recovery obligations are roughly offsetting (*i.e.*, amounts due each party result in a "wash").[39] Under these circumstances, the process of exchanging bills and payments is inefficient. However, where the traffic exchanged between carriers is not balanced, the carrier forced to terminate the surplus traffic would receive no compensation for terminating that traffic under a bill-and-keep regime. The Commission itself has repeatedly "acknowledge(d) that, no matter what the payment arrangement, LECs incur a cost when delivering traffic . . . that originates on another LEC's network."[40] Thus, mandatory bill-and-keep regimes require carriers to incur costs for terminating traffic for no compensation where traffic flows between competing carriers are not roughly balanced. Therefore, mandatory bill-and-keep regimes violate Sections 201, 251 and 252 of the Act and the Reference Paper on Pro-Competitive Regulatory Principles negotiated as part of the WTO Basic Telecom Agreement.

38 However, carriers may agree voluntarily to bill-and-keep provisions (or variations thereof) in negotiated agreements. These comments also assume that there are positive incremental costs associated with the termination of traffic. If there were no positive incremental costs to terminate traffic, then bill-and-keep would be permissible under the Act and current Commission policies without any fundamental changes in the basic assumptions of cost causation.

39 47 U.S.C. § 252(d)(2)(B)(i).

40 *ISP Intercarrier Compensation NPRM*, ¶ 29.

A. Sections 251(b)(5) and 252 of the Act Prohibit Mandatory Bill-and-Keep Where Traffic Flows Between Competing Carriers Are Not Roughly Balanced.

Mandatory bill-and-keep regimes where traffic flows between competing carriers are not roughly balanced are illegal under Sections 251(b)(5) and 252 of the Act.[41] The Act established a presumption that costs imposed as a result of the exchange of traffic between competing LECs shall be recovered. Section 251(b)(5) of the Communications Act of 1934 provides that "[e]ach telecommunications carrier has the duty . . . to establish reciprocal *compensation* arrangements for the transport and termination of telecommunications."[42] Section 252(d)(2) provides that the reciprocal compensation arrangement must (1) provide for the "mutual and reciprocal" recovery of costs by each carrier; (2) determine these costs on the basis of a "reasonable approximation of the additional costs" of terminating traffic; and (3) does not preclude bill and keep arrangements.[43] Mandatory bill-and-keep regimes do not meet the "compensation" requirement of Section 251(b)(5) or the "reasonable approximation of the additional costs" requirement of Section 252(d)(2) because they result in a reciprocal compensation rate of zero for surplus traffic where traffic flows between carriers are not roughly equal.

41 47 U.S.C. §§ 251(b)(5) and 252.

42 47 U.S.C. § 251(b)(5) (emphasis added).

43 47 U.S.C. § 252(d)(2).

B. Section 201(b) of the Act Prohibits Mandatory Bill-and-Keep Where Traffic Flows Between Competing Carriers Are Not Roughly Balanced.

Mandatory bill-and-keep regimes where the traffic flows between competing carriers are not roughly balanced violate Section 201(b) of the Act.[44] Section 201(b) requires that "all charges, practices, classifications and regulations" be "just and reasonable."[45] The United States Court of Appeals for the District of Columbia Circuit has explained that a "basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost."[46] Although Section 201(b) does not require the Commission to establish purely cost-based rates, the Commission must specially justify any rate differential that does not reflect cost.[47] The Commission has not justified, nor could it justify based on any data on record in this or any other proceedings, an intercarrier compensation rate of zero. Therefore, mandatory bill-and-keep regimes, where traffic flows between competing carriers are not roughly equal, are not "just and reasonable" under Section 201(b) of the Act.

C. The Reference Paper of the WTO Basic Telecom Agreement Prohibits Mandatory Bill-and-Keep Where Traffic Flows Between Competing Carriers Are Not Roughly Balanced.

The imposition of mandatory bill-and-keep where traffic flows between competing carriers are not equal would violate the Reference Paper on Pro-Competitive Regulatory Principles negotiated as **part** of the WTO Basic Telecom Agreement ("Reference

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44 47 U.S.C. § 201(b).

45 *Id.*

46 *AllTel* **Corp.** *v. FCC*, **838** F.2d 551, 557 (D.C. Cir. 1988).

47 *See, e.g., CompTel v. FCC*, 87 F.3d 522,529 (D.C. Cir. 1996).

Paper").[48] The Reference Paper obligates the governments that have adopted it as part of their schedules of commitments, including the United States, "to ensure fair, nondiscriminatory and cost-oriented interconnection."[49] Section 2.2 of the Reference Paper governs interconnection with "major suppliers," which in the United States means the ILECs. Subsection (b) of Section 2.2 requires there to be "rates'' for interconnection that are "cost-oriented." Mandatory bill-and-keep regimes do not meet the requirement that rates for interconnection be "cost-oriented" because they result in reciprocal compensation rate of zero for surplus traffic where traffic flows between carriers are not roughly equal.

IV. BANNING VIRTUAL NXXs AND FX-TYPE SERVICES WILL HARM COMPETITION WITHOUT ADDRESSING TRANSPORT ISSUES

In the NPRM, the Commission seeks comment on the use of virtual central office codes ("NXXs"), which are "central office codes that correspond with a particular geographic area [a rate center] that are assigned to a customer located in a different geographic area [rate center]," and their effect on the reciprocal compensation and transport obligations of interconnected LECs.[50] Specifically, the Commission **asks** for comment on the following issues: (1) Under what circumstances should a LEC be entitled to use virtual NXX codes? (2) If LECs are permitted to use virtual NXX codes, what is the transport obligation of the originating LEC? (3) Should the LEC employing the virtual NXX code be required to provide transport from the central office associated with those NXX codes?[51]

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48 *See* Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 12 FCC Rcd 7847, ¶ 9 (1997) (discussing the Reference Paper).

49 *id.*

50 NPRM at ¶ 115.

51 *id.*

CompTel submits that the correct answers to these questions become clear upon consideration of the way in which LECs utilize virtual NXX codes. **As** an initial matter, it is important to note that virtual NXX codes allow business end users to widen their "local" market presence, which many businesses, particularly smaller ones, rely upon to establish a viable market presence and compete effectively. The benefits that result from the use of virtual NXX codes flow through to consumers as well. For example, consumers who subscribe to dial up Internet access or to digital television recorder services (*e.g.*, TIVO or ReplayTV) rely upon virtual NXX codes to utilize these services by calling a number associated with their geographic area. The services that carriers provide using virtual NXX codes are sometimes referred to as "FX services," which CompTel uses here for the sake of simplicity.

Traffic routed to telephone numbers from virtual NXX codes is identical to all other traffic that is subject to reciprocal compensation pursuant to Section 251: (1) the calling party originates a call by dialing a seven- or ten-digit number; (2) the originating carrier delivers the call to the terminating carrier's switch pursuant to the interconnection agreement that governs the relationship between the originating and terminating carrier; (3) the terminating carrier delivers the call to the called party. For all of this traffic, the originating carrier is responsible for delivering the calls to a designated point of interconnection ("POI") with the terminating carrier; The respective locations of the POI, the terminating carrier and the originating carrier do not change based on the number that the called party has opted to use, and both carriers use the same switches, transport facilities, routing tables and interconnection points to complete the call. Accordingly, the network configuration of both the originating and terminating carriers, and thus the transport costs that the terminating carrier incurs, does not vary based on whether the number that the called party has opted to use. For this reason, the originating carrier cannot determine whether the called party for any given call is using a number from a virtual NXX.

The fact that traffic routed to telephone numbers from virtual NXX codes is identical to all other traffic that is subject to reciprocal compensation pursuant to Section 251 becomes even more clear when contrasted with exchange access traffic. Traffic routed to telephone numbers from virtual NXX codes are delivered directly from the originating LEC to the terminating LEC; exchange access traffic is routed from the originating LEC to the IXC chosen by the calling party, which then routes the traffic to the terminating LEC.

Given the way in which virtual NXX codes are used to provide valuable telecommunications services to end users, including many small business who rely on the use of telephone numbers from virtual NXX codes to compete effectively, there is no reason why a LEC should not be entitled to use telephone numbers from virtual NXX codes the same way they are entitled to use telephone numbers from any other NXX code. Because traffic delivered to numbers from virtual NXX codes is identical to traffic delivered to any other NXX code, the terms and conditions for the delivery of this traffic, like all traffic, should continue to be determined in the first instance by the interconnection agreement between the originating and terminating carriers. It would be particularly inappropriate to ban the use of virtual NXX codes due to disagreements over transport costs. Banning the use of virtual NXX codes would simply mask disagreements over the proper number and placement of POIs by denying consumers and businesses, particularly small businesses, the freedom to choose telecommunication services that they utilize to compete effectively in their local markets throughout the United States.

CompTel submits that the FCC should not consider the potential effects that the use of virtual NXX codes could have on numbering utilization due in this docket. The proper proceeding in which to consider the potential effects of the use of virtual NXX codes is Common Carrier Docket No. 99-200, where the Commission is considering numbering optimization.[52] Numbering optimization is complex, and how the use of virtual NXX codes effects overall numbering utilization is a complex issue. For example, the Commission has already identified rate center consolidation as one of the most effective means of numbering optimization.[53] As such, the Commission has encouraged the states to engage in rate center consolidation.[54] Rate center consolidation will greatly reduce the demand for virtual NXXs. Thus, in most cases, it may well be preferable for states to engage in rate center consolidation, which has many other benefits, than to ban the use of virtual NXX. In fact, the use of virtual NXXs theoretically could improve numbering utilization.[55] In any event, encouraging or banning the use of virtual NXXs to improve numbering utilization is a complex topic that relates to many issues currently being considered in CC Docket No. 99-200. Accordingly, the Commission should focus solely on intercarrier compensation issues as part of this proceeding.

In sum, from an intercarrier compensation standpoint, it is clear that consumers and business should be allowed to use telephone numbers from virtual NXX codes. The respective transport obligations of the originating and terminating carriers should continue to be governed by their interconnection agreement, because the respective locations of the POI and the

52 *See generally* Numbering Resource Optimization, CC Docket No. 99-200.

53 *See id.* at ¶ 10.

54 *Id.*

55 For example, in some areas, the ILECs claim that rate center consolidation is not feasible. In those areas, it might be possible for certain CLECs voluntarily to engage in a form of "virtual rate center consolidation" by associating a single NXX code with multiple rate centers rather than one rate center. However, this concept raises many complicated issues that should not be examined as part of this proceeding.

terminating and originating carriers do not change based on the number that the called party has opted to use, and both carriers use the same switches, transport facilities, routing tables and interconnection points to complete a call to a telephone number from a virtual NXX code.

CONCLUSION

For the foregoing reasons, CompTel urges the Commission to reject proposals to impose a mandatory or default bill-and-keep regime on intercarrier compensation.

Respectfully submitted,

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August 21,2001

CERTIFICATE OF SERVICE

I, Michelle Arbaugh, hereby certify that I have caused a copy of the foregoing Comments of the Competitive Telecommunications Association in the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, to be served on this 21st day of August 2001, via hand-delivery, upon the following:

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